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In the Supreme Court of the United States

OCTOBER TERM, 1974

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.,
PETITIONERS
v.
FEDERAL POWER COMMISSION

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,
PETITIONERS
v.
THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

FEDERAL POWER COMMISSION, PETITIONER
v.
THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (A. 38a-112a) is reported at 489 F.2d 1207. The principal order of

the Federal Power Commission (A. 22a–24a) and its order denying rehearing (A. 28a) are reported at 46 FPC 1126 and 46 FPC 1307, respectively.

JURISDICTION

The judgment of the court of appeals (A. 36a–37a) was entered on November 9, 1973. Timely petitions for rehearing by the Federal Power Commission and Arizona Public Service Company, *et al.*, were denied on December 7, 1973 (A. 141a–143a). A petition for clarification by the Chemehuevi Tribe of Indians, *et al.*, was denied on December 11, 1973 (A. 144a).

On February 28, 1974, and March 28, 1974, the Chief Justice extended the Federal Power Commission's time for filing a petition for a writ of certiorari to and including May 6, 1974, and the Commission's petition was filed on that date. On February 27, 1974, and April 3, 1974, Mr. Justice Douglas and the Chief Justice, respectively, extended the time of Arizona Public Service Company, *et al.*, for filing a petition for a writ of certiorari to and including May 6, 1974, and the petition of those parties was filed on that date. The petition for a writ of certiorari of the Chemehuevi Tribe of Indians, *et al.*, was filed on March 11, 1974.

All three petitions were granted and the cases were ordered consolidated on June 10, 1974 (A. 146a).

The jursidiction of this Court rests on 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power

Act, as added, 49 Stat. 860, as amended, 16 U.S.C. 825*l*(b).[1]

QUESTIONS PRESENTED

1. Whether thermal-electric generating plants that draw cooling waters from navigable streams are "project works" subject to the Federal Power Commission's licensing jurisdiction under Section 4(e) of the Federal Power Act, as amended, 16 U.S.C. 797(e).

2. Whether, under Section 4(e) of the Act, the Federal Power Commission has jurisdiction to license the use by thermal-electric generating plants of "surplus water * * * from any Government dam."

STATUTES INVOLVED

Sections 3(10), 3(11), 3(12), 4(e), and 23(b) of the Federal Power Act, as amended, 16 U.S.C. 796(10), 796(11), 796(12), 797(e), and 817 are set forth in the Appendix to this brief, *infra*, pp. 61–64.

STATEMENT

Hydroelectric generating plants use water power—the energy of falling water—to generate electric

[1] In order to facilitate an orderly presentation of the issues in the consolidated cases, the parties agreed upon the following briefing arrangement. The Solicitor General and counsel for Arizona Public Service Company, *et al.*, will each file a single opening brief addressing the issues in all the cases. Counsel for the Chemehuevi Tribe of Indians, *et al.*, will file a single responsive brief also addressing the issues in all cases. The Solicitor General and counsel for Arizona Public Service Company, *et al.*, will each have an opportunity to file a reply brief.

power. Thermal-electric or steam plants generate electricity through the use of steam energy produced by heat from the burning of fossil fuels or from nuclear energy. The steam, at high pressure and temperature, is passed through a turbine, which drives a generator that produces the electricity. Thermal-electric plants use substantial quantities of water to cool and condense the steam after it has passed through the turbines.

Since 1921, the Federal Power Commission has taken the position that its licensing jurisdiction under Part I of the Federal Power Act, as amended, 16 U.S.C. 791a-823,[2] applies only to non-federal hydroelectric generating plants.

1. The present case arose on a complaint (A. 1a–17a) filed with the Commission by two Indian tribes, five individual Indians, and two environmental groups,[3] seeking an order requiring the owners of six present and planned fossil-fueled steam-electric generating plants to apply for licenses to construct and operate those plans. The complaint asserted (A. 5a–6a) that the Commission has Part I licensing jurisdiction over the plants under Section 4(e) of the Act,

[2] Part I of the Federal Power Act was originally enacted as the Federal Water Power Act, approved June 10, 1920 (41 Stat. 1077). By Title II of the Public Utility Act of 1935 (49 Stat. 838), the original Federal Water Power Act, with certain clarifying amendments, was made Part I of the Federal Power Act.

[3] The Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay, the Sierra Club, the Committee to Save Black Mesa. We refer to these parties as the Complainants.

as amended, 16 U.S.C. 797(e),[4] because all six plants are "project works" for the development, transmission, and utilization of power across, along, and in navigable waters, and because two of the plants will use "surplus water" from a "Government dam."

The six thermal-electric generating plants to which the complaint was directed are owned jointly by ten public utilities,[5] and are located in the Four Corners area of New Mexico, Arizona, Utah, and Colorado. The plants use or will use waters of the Colorado River system in their boilers and for cooling purposes, but none obtains any water from a project licensed by the Commission.[6]

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[4] Section 4(e) empowers the Commission to issue licenses to citizens, corporations, and state and municipal agencies "for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient * * * for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam * * *."

[5] Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water and Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

[6] The Mohave Plant is located on patented land in Clark County, Nevada. It has two 750,000 kilowatt coal-fired steam generating units. Cooling water for the plant is withdrawn from the mainstream of the Colorado River downstream from the Davis Dam, pursuant to a contract between the Secretary of the Interior and the Colorado River Commission and a con-

The complaint alleged that the plants were being constructed, operated, and maintained without licenses or permits required under Part I of the Act

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tract between the River Commission and one of the plant owners.

The Four Corners Plant is located on the Navajo Indian Reservation near Farmington, New Mexico. It has five coal-fired steam generating units with a combined capacity of approximately 2,087 megawatts. The plant's water is taken from the natural flow of the San Juan River downstream from Navajo Dam. The water is obtained under a permit issued by the New Mexico State Engineer.

The San Juan Plant is located on patented land near Farmington, New Mexico. It is operating one coal-fired steam generating unit with a nominal rating of 330,000 kilowatts. As many as three other such units may be added. Water is obtained from the San Juan River downstream from Navajo Dam pursuant to a contract between the Secretary of the Interior and one of the owners of the plant.

The Huntington Plant is located primarily on state and patented land in Huntington Canyon, Utah. It has one 430,000 kilowatt coal-fired steam generating unit. Two units of comparable size are planned. The plant's water is obtained from private companies who have appropriated the water under Utah law from Huntington Creek. The Secretary of the Interior has also contracted with the plant's owner to provide water from Joe's Valley Reservoir on Huntington Creek. No water has yet been delivered under the latter contract.

The Navajo Plant is located on the Navajo Indian Reservation near Page, Arizona. It has three coal-fired steam generating units rated at 770,000 kilowatts each. The plant's water is withdrawn from Lake Powell, the reservoir created by Glen Canyon Dam, pursuant to a contract between the Secretary of the Interior and the owners of the plant.

The Kaiparowits Plant, which is still in the planning stages, will be a coal-fired generating plant with a capacity of 2,000 megawatts. It will be located in southern Utah near Lake Powell, the proposed source of the plant's water. Water is to be provided pursuant to a contract between the United States Bureau of Reclamation, Department of the Interior, and the owners.

(A. 6a).[7] It sought an order directing the owners of the plants "to show cause why they should not be required to apply for licenses" and "why they should not be required to suspend all development, planning and construction of the plants in question, pending the outcome of these proceedings" (A. 11a).

The Commission dismissed the complaint on the ground that it has no jurisdiction to license steam plants (A. 22a–24a). The Commission stated that "the legislative history [of the original Federal Water Power Act] shows that it was not intended that the licensing of thermal stations be included" (A. 24a). "This construction of the Commission's licensing jurisdiction under Part I of the Federal Power Act has been the long-standing interpretation of the Commission" and "has been recognized favorably by the Supreme Court" (*ibid.*).[8]

2. On the complainants' petition for review, the court of appeals sustained the Commission's determination in part. It held that thermal-electric plants are not "project works" under Section 4(e) and that the Commission therefore has no licensing jurisdiction over the plants under that clause (A. 53a–97a).

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[7] Section 23(b) of the Act, as amended, 16 U.S.C. 817, makes it unlawful, "for the purpose of developing electric power, to construct, operate, or maintain any dam, * * * or other works * * * along * * * any of the navigable waters of the United States, or upon any part of the public lands * * *, or utilize the surplus water or water power from any Government dam, except under * * * a license granted pursuant to this Act."

[8] The Commission cited *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 110.

The complainants' application for rehearing (A. 25a–27a) was thereafter denied (A. 28a).

The court traced in detail the legislative history and purpose of the Act and the consistent administrative and judicial interpretation since its enactment in 1920. It concluded that the Commission's licensing jurisdiction extends only to hydroelectric generating plants and that "[s]team plants were purposely omitted from the congressional scheme" (A. 90a).

The court also held, however, that the Commission's licensing authority under the "surplus water" clause is *not* limited to plants using such water to generate hydroelectric power but includes steam plants using "surplus water" for cooling purposes (A. 97a–112a). In the court's view, the "surplus water" clause, unlike the "project works" clause, "reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements as well as a concern with comprehensive water resource management" (A. 109a). It "was intended to afford the FPC a broad licensing authority over federally controlled waters" (*ibid.*).

The court did not attempt to define "surplus water" and did not decide whether the six plants involved in this case are within the Commission's licensing jurisdiction under that clause. It held, however, "that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants," and it remanded the case to the Commission "to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners" (A. 112a). The court specified that, "[i]n determining this question, the Commission should also consider whether any jurisdiction it might

have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency" (*ibid.*).[9]

ARGUMENT

THE FEDERAL POWER COMMISSION HAS NO JURISDICTION UNDER PART I OF THE FEDERAL POWER ACT TO LICENSE EITHER THE CONSTRUCTION AND OPERATION OF THERMAL-ELECTRIC GENERATING PLANTS OR THE USE BY SUCH PLANTS OF SURPLUS WATER FROM A GOVERNMENT DAM

A. INTRODUCTION AND SUMMARY

1. The court of appeals held that the Commission does not have licensing jurisdiction over thermal-electric plants under the "project works" clause of Section 4(e) of the Act, but that it does have licensing jurisdiction over such plants under that Section's "surplus water" clause. We submit that the decision is correct with respect to "project works" but incorrect with respect to "surplus water."[10]

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[9] The court stated that some legislation enacted after Section 4(e) may have "diluted Commission authority" to manage federal water resources (A. 110a). The reclamation Acts, flood control Acts, and Tennessee Valley Authority legislation, for example, "obviously cut into FPC authority to regulate the utilization of surplus water of power" (A. 111a), because those Acts empower the Secretary of the Interior, the Secretary of the Army, and the TVA to dispose of any surplus water from dams they operate. Consequently, "it is apparent that in every case involving a contention of the applicability of the 'surplus water' clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsibility for the particular Government dam" (*ibid.*).

[10] Although the issues in this case are framed in terms of the scope of the Commission's power under Section 4(e) to issue a license, it is actually Section 23(b), 16 U.S.C. 817 (set forth *infra*, pp. 63–64), that states the circumstances in which a person

This conclusion follows, in our view, from the court's own thorough analysis in the "project works" portion of its opinion—an analysis with which we generally agree and to which we have little to add. That section of the opinion demonstrates, by reference to the language of the statute, its legislative history and purpose, and its consistent administrative and judicial interpretation, that Part I of the Federal Power Act applies only to hydroelectric generating plants and not at all to thermal-electric generating plants.

In our view, the court's careful reasoning in the "project works" section of its opinion bears equally upon the proper interpretation of the "surplus water" clause. As we shall show, that reasoning rests upon the history, purpose, and consistent interpretation, not of the "project works" clause alone, but of the

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is required to invoke the Commission's authority by seeking to obtain a license. In our view, the two sections are harmonious, and the limits of the latter necessarily bear upon the scope of the former. The language of the sections does differ in some respects, however, as we point out below (*infra*, pp. 57–58), and, to the extent that those textual differences might be deemed significant, it is Section 23(b) rather than Section 4(e) that would control the determination of whether the owners of a thermal-electric plant *must* obtain a license. Thus, even if the Commission had the power, contrary to our reading of Section 4(e), to issue a license to a steam plant at the request of the owners, that would not necessarily mean that the owners would be acting unlawfully if they failed to secure such a license. Since the complainants in this case sought an order to show cause why the owners of the plants "should not be required to apply for licenses" (A. 11a), the owners' obligations under Section 23(b), rather than the Commission's powers under Section 4(e), would be determinative in this case if there were a difference between them.

entire Act. Just as the court's analysis fully supports its conclusion on the "project works" clause, the same analysis persuasively undercuts its conclusion on the "surplus water" clause. In neither clause does the Act confer upon the Commission licensing jurisdiction with respect to thermal-electric plants.

2. The Act's original title (Federal Water Power Act), its preamble, the language of Section 4(e), the language of other sections, and the scheme of the Act reflect the overriding congressional purpose to further the development of water power projects for the generation of hydroelectric energy. The Act contains no reference to thermal-electric generation, even though that was and is by far the greater source of electric energy in this country.

The legislative history of the Act reveals that Congress was concerned exclusively with the development of water power and that steam power was purposely omitted from the legislative scheme. The bill that ultimately became the Federal Water Power Act was designed to meet "the need for legislation for the development of hydroelectric power" (H. Rep. No. 61, 66th Cong., 1st Sess., p. 4), and the licensing jurisdiction of the Federal Power Commission was therefore limited to water power projects.

Thus, in the first year of its existence, the Commission interpreted its own jurisdiction as "limited to the consideration of projects designed to produce water power" (1921 Annual Report, pp. 51–52), and it held that it has no jurisdiction to license thermal-electric facilities (*id.* at 155–156). In the 53 years since then, the Commission has regularly reiterated,

both in its annual reports to Congress and in its formal adjudicatory decisions, the view that its "licensing jurisdiction under Part I of the Federal Power Act is limited to projects for the generation of hydroelectric power" (1962 Annual Report, p. 13). This consistent and contemporaneous construction of the Act by the agency charged with its administration is entitled to substantial weight.

This Court has clearly expressed its understanding that the Act applies only to hydroelectric facilities and not to steam-electric facilities. In *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 110, the Court stated that the Act "is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful * * *."

Although changes in steam plant technology have led to facilities with capacities much greater than those in existence in 1920 when the Act was passed, Congress was aware then that steam power was the primary source of electric energy and yet it deliberately omitted steam plants from the Commission's licensing jurisdiction. The Commission was not given a mandate to regulate the entire power industry, and the changed conditions do not justify an assertion of jurisdiction over an aspect of that industry that was deliberately excluded from regulation.

If, as complainants say, there are considerations of policy that now favor giving the Commission licensing jurisdiction over steam plants, those con-

siderations should be addressed to Congress, not the courts. The issue here is not what Congress *should do* but what it *did* in the Federal Power Act. It deliberately limited the Commission's licensing jurisdiction to water power projects. As a consequence, the existing statutory scheme is not designed for the regulation of the steam power industry and would not be adequate to guide the Commission's exercise of a licensing authority over that industry.

3. The extensive legislative history of the surplus water clause shows that it was not meant to be an exception to the Act's limitations. Like the rest of the Act's licensing provisions, it applies only to the use of water in the development of hydroelectric energy.

The phrase "surplus water or water power" in Section 4(e) has antecedents in several of the comprehensive water power bills that were considered by Congress during the six years before the Act was finally passed in 1920. In its early form, the clause would have authorized the Secretary of War to lease "the right *to develop power from the surplus water* over and above that required for navigation at any navigation dam" (H.R. 16053, 63d Cong., 2d Sess., § 14; emphasis added). Although the wording of the clause gradually evolved to its present form (giving the Commission authority to license the use of "the surplus water or water power from any Government dam"), its essential meaning was unchanged. The clause was always intended to regulate only the development of *water power* from water in excess of that required for government purposes at a dam.

The conclusion of the court of appeals that the clause reaches the use of such water for cooling purposes in a steam plant rests in part upon its erroneous impression that the Federal Power Commission inherited the broad planning and coordinating functions of the Waterways Commission. The legislative history demonstrates, however, that the water resource responsibilities of the Waterways Commission, whose members had never been appointed, were wholly investigatory and advisory. It had no regulatory or licensing functions. Moreover, Congress considered but rejected a provision that would have transferred those investigatory powers to the newly-created Federal Power Commission. In the end the Power Commission did not inherit the Waterways Commission's function with respect to uses of water for other than the development of water power.

Legislation enacted prior and subsequent to the Federal Water Power Act gives other agencies express authority to dispose of surplus water within their jurisdiction for purposes other than hydroelectric power development. Those statutes do not, however, support the court of appeals' reading of Section 4(e). To the contrary, they show that Congress knows how to confer jurisdiction over other uses of water when it determines to do so.

The Commission's interpretation of the surplus water clause does not render it meaningless. When Section 4(e) is read, as it must be, in connection with Section 23(b), it becomes clear that the surplus water clause has independent application and, in certain cir-

cumstances, could alone provide a basis for the Commission's exercise of licensing authority. Even in those situations where a hydroelectric plant using surplus water from a government dam would also have to be licensed under the project works clause, the surplus water clause could provide an alternative jurisdictional base or an additional licensing requirement.

B. THE LANGUAGE, HISTORY, AND PURPOSE OF THE ACT AND ITS CONSISTENT ADMINISTRATIVE AND JUDICIAL INTERPRETATION SHOW THAT THE COMMISSION'S LICENSING JURISDICTION IS LIMITED TO HYDROELECTRIC POWER PROJECTS

1. The limited scope of the Act's licensing provisions is reflected in the statutory language and in the Act's original title and preamble.

Statutory interpretation starts, of course, with the language to be interpreted. See *Flora* v. *United States*, 357 U.S. 63, 65. But that language "should not be read in isolation from the context of the whole Act" (*Richards* v. *United States*, 369 U.S. 1, 11). "[I]n fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy'" (*ibid.*).

We recognize that the bare words of Section 4(e) of the Federal Power Act, as amended, 16 U.S.C. 797 (e), do not themselves conclusively limit that subsection's applicability to hydroelectric power plants. The words do, however, suggest that limited purpose, and the context in which they appear fortifies the suggestion.

Section 4(e) authorizes the Commission to issue licenses "for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient * * * for the development, transmission, and utilization of power across, along, from, or in any [waterways] * * * over which Congress has jurisdiction * * *, or upon any part of the public lands and reservations * * *, or for the purpose of utilizing the surplus water or water power from any Government dam * * *." The terms preceding the phrase "other project works"—"dams, water conduits, reservoirs, power houses, transmission lines"—particularly when conjoined, refer to structures that ordinarily are associated primarily with hydroelectric rather than thermal-electric power projects.[11]

That the limitation upon the reach of Section 4(e) is not plainer from the words of the subsection itself is understandable. Congress apparently assumed that the Act's limited scope was clear enough from its very title, as well as from its preamble and the language contained in other subsections. What is now Part I of the Federal Power Act was originally enacted in

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[11] The definition of "project" in 16 U.S.C. 796(11) similarly refers to features of hydroelectric facilities. A "project" is a "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, * * * and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use or occupancy of which are necessary or appropriate in the maintenance and operation of such unit * * *."

1920 as the Federal *Water* Power Act (41 Stat. 1063). The Act's preamble specifies as among its purposes "the development of water power" (41 Stat. 1063). No mention is made of the development of steam power or of power generally.

We recognize that the title and preamble of a statute "cannot undo or limit that which the text makes plain" (*Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 529). But they are "tools available for the resolution of a doubt" and may "shed light on some ambiguous word or phrase" (*ibid.*). See, also, *Maguire* v. *Commissioner*, 313 U.S. 1, 9; *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 388–389. Here the title and preamble furnish the context within which the scope of the Act's licensing provisions is to be understood.

As the court of appeals correctly observed (A. 73a–74a), other provisions of the Act's text reinforce the implications of the language of Section 4(e), the title of the Act, and the preamble. Section 4(a), 16 U.S.C. 797(a), authorizes the Commission to make investigations concerning "the *water-power* industry and its relation to other industries and to interstate or foreign commerce" (emphasis added). No mention is made of the steam power industry. Section 4(g), 16 U.S.C. 797(g), authorizes the Commission to investigate the proposed occupancy of public lands and waterways for the development of electric power and to issue appropriate orders "to conserve and utilize the navigation and *water-power* resources of the region" (emphasis added). No similar authority is con-

ferred in Part I of the Act with respect to the conservation of water resources for the development of steam power.

Section 10(a) of the Act, 16 U.S.C. 803(a), provides that a license under the Act may be issued only when the project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways * * *, for the improvement and utilization of *water-power* development, and for other beneficial public uses" (emphasis added). Section 24, 16 U.S.C. 818, provides that any federal lands included in a proposed project shall, upon the filing of an application, "be reserved from entry, location, or other disposal" until the Commission or Congress otherwise orders, but that "locations, entries, selections, or filings heretofore made for lands reserved as *water-power* sites, or in connection with *water-power* development, or electrical transmission may proceed to approval or patent" under conditions specified in the section (emphasis added).

These explicit references to water power reflect the limited scope of the Act's underlying purpose: to provide for the development of hydroelectric power generating facilities. If Congress had intended to confer on the Commission licensing jurisdiction over steam plants as well as hydroelectric plants, it did so in a most unusual fashion. Steam power was and is by far the major source of electrical energy (see A. 49a–50a, 58a, 73a). It is not likely that Congress would silently and obliquely bring the steam power industry within the Commission's licensing jurisdiction without so much as a reference to steam power in the Act or

its preamble. Nor is it likely that the Act would in those circumstances have been given a title that so plainly suggests an exclusive concern with hydroelectric power.

If these considerations do not themselves conclusively resolve the question concerning the reach of the Commission's licensing jurisdiction, they at least make the issue "sufficiently doubtful to warrant our resort to extrinsic aids to determine the intent of Congress, which, of course, is the controlling consideration" (*Cass* v. *United States*, No. 73–604, decided May 28, 1974, slip op. 5). As in *Cass*, "[s]uch aid is available in this case" and there is no reason "to ignore the clearly relevant history" of the statute (*id.* at 7).

2. The legislative history of the Act supports the court of appeals' conclusion that Congress did not intend to give the Commission licensing jurisdiction with respect to thermal-electric power plants.

The court of appeals determined (A. 72a): "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power." "Steam plants were purposely omitted from the congressional scheme" (A. 90a). We submit that the legislative history recounted in detail by the court fully supports its conclusion.

In the late 19th and early 20th centuries, federal efforts to manage the development and use of the nation's waterways were piecemeal and often haphazard

(A. 55a–59a).[12] It was "the escalating private appropriation of [hydroelectric power] sites that evoked the early federal regulatory initiatives" (A. 58a), such as the General Dam Act (34 Stat. 386), which was intended "to permit the development of water power while facilitating the improvement of stream navigability by the Government through the utilization of private capital" (A. 59a).

Experience proved, however, that the system of federal regulation of water power development was inadequate, and between 1914 and 1917 various bills attempting to correct the deficiencies were introduced in Congress.[13] The committee reports on several of these bills expressly refer to the development of hydroelectric power, while making no mention of regulating steam power.[14]

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[12] Legislation in that period included numerous Rivers and Harbors Acts aimed at preventing the obstruction of navigable waterways (see A. 55a–57a and n. 36); laws granting rights of way over public lands for purposes of irrigation or electric power generation (see A. 57a and nn. 37, 38); and bills routinely approved by Congress awarding hydroelectric power sites to private interests (A. 57a).

[13] Among the bills dealing with water power development on navigable waters were the Adamson Bill, H.R. 16053, 63d Cong., 2d Sess., and the Shields Bill, S. 3331, 64th Cong., 1st Sess. Bills addressed to the development of water power on the public lands included the Ferris Bill, H.R. 16673, 63d Cong., 2d Sess., and the Myers Bill, H.R. 16673, 63d Cong., 3d Sess., which was the Senate's response to the original wording of the Ferris Bill. See, also, H.R. 408, 64th Cong., 1st Sess.; S. 2399, 65th Cong., 1st Sess.

[14] See, *e.g.*, S. Rep. No. 89, 64th Cong., 1st Sess., pp. 2–4; H. Rep. No. 404, 64th Cong., 1st Sess., pp. 6–9; H. Rep. No. 842, 63d Cong., 2d Sess., pp. 1–4, 6; S. Rep. No. 898, 63d Cong., 3d Sess., Pt. 1, pp. 2–3; H. Rep. No. 16, 64th Cong., 1st Sess.,

In 1918, a bill prepared by the Secretaries of War, Interior, and Agriculture at the direction of President Wilson (H.R. 8716, 65th Cong., 2d Sess.) was sent to Congress. The bill contained most of the provisions eventually included in the Federal Water Power Act. In a letter to the chairman of the special House Committee on Water Power, which had held hearings on H.R. 8716, the Secretaries indicated that the bill was intended to apply only to hydroelectric projects. The letter (set forth at A. 66a–68a, n. 62) stated that, "[w]hile the form of bill which has been presented for your consideration *is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry" (H. Rep. No. 715, 65th Cong., 2d Sess, p. 29; emphasis added).

Testimony before the committee was to the same effect. One witness specifically stated that the bill would not reach thermal-electric plants:[15]

> Mr. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected—or will not be subjected, generally speaking—to the govern-

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pp. 2–5, 7, 9, 12–14; S. Rep. No. 66, 64th Cong., 1st Sess., Pt. 2, pp. 1–3, 13. See, also, H. Rep. No. 715, 65th Cong., 2d Sess., p. 15, in which the special House Committee on Water Power, referring to these earlier bils, stated that the "subject of water-power legislation with a view to the development of *hydro-electric* power has been a matter of very great public interest for a number of years" (emphasis added).

[15] Hearings, before the House Committee on Water Power, 65th Cong., 2d Sess., p. 179.

mental regulations that this bill provides for will they?

Mr. TOWNLEY. No, sir.

Mr. TAYLOR. And they will not be subjected either to the payment of Federal royalties?

Mr. TOWNLEY. No, sir.

That testimony went unchallenged throughout the hearings.

In its report, the committee stated that the theory of the bill was "to provide for the development of *hydroelectric* power by private capital" (H. Rep. No. 715, 65th Cong., 2d Sess., p. 15; emphasis added).[16] The report stated that "conditions growing out of the European war" had created actual or potential power shortages and had emphasized "[t]he necessity for the development of additional hydroelectric power" (*ibid.*).[17] In neither the floor debates[18] nor the conference report that followed[19] was there any intimation that the bill was meant to apply as well to thermal-electric generating facilities.

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[16] The report accompanied S. 1419. The committee proposed substituting the provisions of H.R. 8716 for those originally contained in S. 1419.

[17] The report of the Senate Commerce Committee to accompany the original version of S. 1419 also stated that the bill provided for "the development of hydroelectric energy produced by utilization of water power" (S. Rep. No. 179, 65th Cong., 2d Sess., p. 2).

[18] See the statement of Congressman French (56 Cong. Rec. 9314):

"We have here the question that has been considered for several years—the working out of the best way for the development and utilization of *hydroelectric* power of our country" (emphasis added).

[19] H. Conf. Rep. No. 1147, 65th Cong., 3d Sess.

The bill was not enacted by the 65th Congress, because a Senate filibuster at the close of the session prevented it from reaching a vote before adjournment (A. 69a, n. 62).[20] The bill was reintroduced in the following Congress, however, and was reported to the House without further hearings. The House Committee on Water Power recommended approval of the bill (H.R. 3184) to meet "the need for legislation for the development of *hydroelectric* power" (H. Rep. No. 61, 66th Cong., 1st Sess., p. 4; emphasis added).[21]

In remarks on the Senate floor, Senator Jones, one of the bill's principal proponents, gave a synopsis of the bill. He stated (59 Cong. Rec. 244; emphasis added):

> The bill creates a Federal *water-power* commission * * * to which is given authority over all matters over which the Federal Government has jurisdiction, pertaining to *the development of water powers* in navigable streams * * *.
>
> Under the bill, the commission is granted authority * * * *to issue licenses for water-power development* * * *.

There is no suggestion in the committee reports, the conference report, or elsewhere in the debates that the bill would authorize the Commission to issue licenses for *steam* power development.

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[20] See *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 102, n. 18.

[21] The House report was reprinted in the report of the Senate Committee on Commerce, which also recommended adoption of the bill in view of "the need for or the beneficent results to come from water power development" (S. Rep. No. 180, 66th Cong., 1st Sess., p. 2).

The bill passed both houses of Congress and was signed into law as the Federal Water Power Act on June 10, 1920.

In the next session of the same Congress, the Act was amended to eliminate from the Commission's jurisdiction the licensing of projects "within the limits as now constituted of any national park or national monument" (41 Stat. 1353). The amendment (S. 4554, 65th Cong., 3d Sess.) was introduced by Senator Jones (60 Cong. Rec. 28) to fulfill a commitment to President Wilson, who had been reluctant to sign the Federal Water Power Act if it would give the Commission control over hydroelectric development within the national parks and monuments (see *id.* at 403–404). The bill was reported orally to the Senate (*ibid.*), debated briefly (*id.* at 2001–2002, 3789, 4204), and passed by both houses.

Remarks on the floor of both houses reflect the assumption that the Federal Water Power Act was limited to the licensing of water power projects. Senator Walsh explained that the Water Power Act had been objected to by the Secretary of the Interior on the ground that it gave the Commission "authority to authorize the construction of dams for power purposes within the national parks" (*id.* at 2002). In the House, Congressman Esch echoed that remark (*id.* at 4204): "The Secretary of the Interior had great doubt as to the policy of giving to a commission control over national parks and monuments in the matter of water-power development."

By Title II of the Public Utility Act of 1935 (49 Stat. 838), the original Federal Water Power Act was

made Part I of the Federal Power Act. The amendments to the original Act, "all minor," were "requested by the Federal Power Commission, largely for the purpose of clarifying the Act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars" (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 7).[22] Nothing in the legislative history of the Public Utility Act suggests that the Commission was to have licensing jurisdiction over thermal-electric generating facilities.

3. The Commission has consistently interpreted the Act to confer licensing jurisdiction only over hydroelectric facilities, and that interpretation is entitled to great weight.

In its First Annual Report to Congress, the newly created Federal Power Commission interpreted its own licensing jurisdiction as extending only to hydroelectric projects. The report stated (1921 Annual Report, pp. 51–52; emphasis added):

> On neither the public lands and reservations nor on the waters of the United States is the jurisdiction of the Federal Power Commission as broad as the jurisdiction of Congress. The latter has authority over all forms of use; *the Commission is limited to the consideration of projects designed to produce water power.* Structures or diversions having any other purpose, unless incidental to works constructed for

[22] See, also, S. Rep. No. 621, 74th Cong., 1st Sess., Pt. 1, p. 43:

"In section 4(d), here relettered (e), the provisions authorizing the Commission to issue licenses are brought together in one general grant of power. * * * The provisions for the issuance of licenses on public lands and for the utilization of surplus power of Government dams are left unchanged."

> power purposes or a necessary part of a comprehensive scheme of development, are not within the jurisdiction of the Commission.

The report also contained an opinion of the Commission's chief counsel, approved by the Commission, concluding that it has no jurisdiction to approve a right of way over public lands for a transmission line that would transmit electricity generated by a steam plant, because the Commission's jurisdiction is limited to structures related to hydroelectric power generation (*id.* at 155–156).[20]

Subsequent Annual Reports reiterated the Commission's consistent view that its licensing authority extends only to non-federal hydroelectric projects on lands or waters subject to federal jurisdiction.[21] The

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[20] The chief counsel's opinion stated (pp. 155–156):

"[A] transmission line having no connection with a water-power project does not come within the purview of the Federal Water Power Act * * *.

* * * * *

"I think it is fairly to be inferred from the context, as well as the circumstances surrounding the enactment of the legislation, that it was the purpose of Congress to confer exclusive jurisdiction on the Federal Power Commission, except as provided therein, over the matter of issuing licenses for power projects, or parts thereof, for the development of hydroelectric power, and that it was not intended to vest the Commission with jurisdiction over the public lands for other purposes. If this view be correct, it follows that where a proposed transmission line is in no way connected with a water-power project the Commission is without jurisdiction to license the same."

[21] See the Commission's Annual Reports for the following years: 1935, p. 1; 1939, p. 2; 1940, pp. 1–5; 1946, pp. 2–3; 1949, p. 3; 1950, p. 3; 1951, p. 2; 1956, pp. 3, 5; 1957, pp. 3, 4; 1958, p. 4; 1959, p. 4; 1960, p. 5; 1961, p. 7; 1962, pp. 8, 12–13; 1963, p. 7; 1964, pp. 10–11, 13; 1965, p. 10; 1966, pp. 8–9, 13; 1967, p. 25; 1968, p. 29; 1969, p. 25; 1970, p. 31; 1971, p. 22.

Commission's 1962 Annual Report, for example, described a new legislative recommendation to amend the Federal Power Act. The proposed amendment was designed to extend the Commission's existing authority by giving it licensing jurisdiction over "new facilities to be erected in or abutting the navigable waters of the United States for the diversion of water for use in a steam-electric generating plant" (pp. 12–13). "At present," the report stated, "the Commission's licensing jurisdiction under Part I of the Federal Power Act is limited to projects for the generation of hydroelectric power" (p. 13).[25]

The proposed amendment, which was not adopted by Congress, remained a part of the Commission's legislative program for several years. Subsequent Annual Reports repeated the recommendation made in 1962 and reiterated that the Commission's existing authority does not extend to the regulation of steam

[25] The report explained why the Commission believed that a limited extension of its jurisdiction would be appropriate (p. 13):

"[I]ncreasingly in recent years plants for steam-electric generation have been built adjacent to navigable waters of the United States with diversion facilities in, across or along the stream to provide water for cooling purposes. Under existing law such projects have required special authorizing legislation by the Congress. It is believed that the determinations of the relationship of such projects to the comprehensive development of navigable waters of the United States can efficiently and promptly be made by this agency, which has performed this function with respect to hydroelectric projects since 1920, while relieving Congress of an increasingly burdensome task. In recognition of the more limited control which need be exercised over facilities located on navigable waters in connection with steam-electric plants, the amendment spells out the limits of Commission authority."

power facilities. 1964 Annual Report, pp. 10–11; 1966 Annual Report, pp. 8–9.

The Commission's view of its licensing authority was expressed in its formal decisions as well. In 1965, the Commission, acting pursuant to Section 10(b) of the Act, 16 U.S.C. 803(b),[28] authorized the licensee of a licensed hydroelectric project to grant an easement on project land to another company for the purpose of constructing and operating steam-electric generating facilities. *Brazos River Authority,* 34 FPC 1507. It also authorized the licensee to "permit the use of its reservoir and other project works as a source of and return for cooling water for [the] steam-electric generating facilities" (*id.* at 1509).

These actions, however, were not an assertion of jurisdiction over the steam-electric project over its use of the water. Rather, they were solely an exercise of the Commission's authority over the disposition of water and land of the licensed hydroelectric project. The Commission was explicit on this point. It stated (*id.* at 1508–1509):

> Licensee has not expressly requested the Commission to authorize the construction and operation of the Companies' steam-electric generating plants, but, lest our action herein be interpreted as authorizing such construction or operation, we wish to make clear * * * that the Commission is not empowered to license

[28] Section 10(b) provides that "no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works [of a specified capacity] constructed hereunder * * * without the prior approval of the Commission * * *."

steam-electric generating facilities and that we have not undertaken to do so herein.

As the court of appeals correctly recognized (A. 76a), this consistent administrative construction of the Act since its enactment, regularly made known to Congress in the Commission's Annual Reports, "is entitled to great weight" (*Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210). "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration" (*Udall* v. *Tallman*, 380 U.S. 1, 16). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'" (*Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408).

As the court of appeals also correctly stated, "[i]t is not without significance * * * that this administrative interpretation was transmitted directly to Congress the year after passage of the Act, and that the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction" (A. 76a). See *United States* v. *Wyoming*, 331 U.S. 440, 452–453. "By reenacting unchanged the material provisions of the Act with knowledge of the contemporaneous construction

placed upon the Act by those charged with its administration, Congress can be said to have indicated its satisfaction with that construction" (A. 77a). See *Cammarano* v. *United States*, 358 U.S. 498, 510–511.

4. This Court has clearly expressed its understanding that the Commission's licensing authority extends only to hydroelectric projects.

The question presented by these cases—whether the Commission has licensing jurisdiction with respect to steam-electric generating facilities—is not one of first impression for this Court. In *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90—where the Court held that a license was required under Part I of the Federal Power Act to construct a pumped-storage hydroelectric plant that would generate electricity for interstate transmission—all nine Justices agreed that the Act's licensing provisions are inapplicable to steam plants.

The question arose in this way. The Commission asserted licensing jurisdiction over the pumped-storage hydroelectric plant, to be located on a non-navigable tributary of a navigable stream, on the ground that it would generate electricity for interstate transmission and would thereby affect "the interests of interstate or foreign commerce" within the meaning of Section 23(b) of the Act, 16 U.S.C. 817. That Section provides that a "dam or other project works" proposed to be located on a non-navigable stream subject to federal jurisdiction may not be constructed or operated without a license if the Commission finds that "the interests of interstate or foreign

commerce would be affected by such proposed construction * * *."

The respondent argued that "commerce" under Section 23(b) means *water* commerce and that a license is therefore required only if the project would affect the interests of navigation or water commerce on the downstream navigable waterway. To rest licensing jurisdiction over the pumped-storage project solely on the interstate transmission of energy, respondent argued, would be inconsistent with the Commission's "view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b), although located along a stream over which Congress has jurisdiction" (381 U.S. at 109). Since, in respondent's view, "there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use" (*id.* at 109–110), the Commission's failure to assert jurisdiction over steam plants suggests that Congress intended in Section 23(b) to invoke only its power over navigable waters and not its full authority over interstate commerce generally.

The Court held, however, that the purpose of the Federal Water Power Act was not merely to improve navigability so as to enhance water commerce. "The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy" (*id.* at 99).[27]

[27] This purpose, the Court stated, is reflected not only in the Act's title, but also in its provisions, including the preamble ("to provide for the * * * development of water power"), Sec-

Thus, while "[t]he Act unquestionably involved an invocation of the congressional power over navigation under the Commerce Clause" (*id.* at 102), Congress also intended to invoke "its full Commerce Clause authority over hydroelectric projects located on waters subject to federal jurisdiction" (*id.* at 105).

The Court therefore concluded that, "[i]f the comprehensive development of water power, 'in so far as it was within the reach of the federal power to do so,' * * * was the central thrust of the Act, there is obviously little merit to the argument that § 23(b) requires a license when the interests of water commerce are affected but dispenses with the license when other commerce interests are vitally involved" (*id.* at 101).

The Court also specifically rejected, in light of the Act's "central concern," the claim that "there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use" (*id.* at 109–110). It held that the Act's purpose was to provide for the development of *hydroelectric* energy, not to regulate the generation of *steam-electric* energy, and that this basic limitation of the Commission's licensing authority explains the different treatment of the two types of projects. The Court stated (*id.* at 110):

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tion 10(a) (proposed project must "be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development"), and "[o]ther provisions regulat[ing] the operations, services, charges, and duration of hydroelectric plants, 'provisions * * * not essential to or even concerned with navigation as such,' but which 'have an obvious relationship to the exercise of the commerce power'" (381 U.S. at 100–101).

> On [respondent's] reasoning either the Act should, but does not, require a license for a steam plant when situated on the navigable mainstream itself, or should not, but does require a license for a hydroelectric plant, pumped storage or otherwise, situated on the mainstream but which has no demonstrable effect, or a beneficial effect, on navigability.
>
> The answer to this conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission.

The three dissenting Justices, speaking through Mr. Justice Goldberg, would have interpreted "commerce" to mean water commerce. They agreed with the respondent that the Court's ruling "produces a substantial anomaly, for steam generating plants that affect interstate commerce in a manner identical to that of hydroelectric plants such as the one involved here would not be required to obtain a license from the Commission, yet hydroelectric plants would have to obtain one" (*id.* at 114).

Though the dissenting Justices thus rejected the majority's explanation of the difference between pumped-storage and steam projects, they would have

held that *both* types of plants are outside the scope of the Commission's licensing authority. Mr. Justice Goldberg stated: "The legislative history here * * * establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved" (*id.* at 115).[28]

[28] The Court's earlier decisions also reflect an understanding that the Commission has no licensing authority with respect to thermal-electric plants. In *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, the Court held that an applicant for a license to construct and operate a hydroelectric facility need not first obtain a state permit for the facility. The Court reasoned that the Act divides responsibilities with respect to power development between the Federal Power Commission and the states and gives to the Commission full authority to grant "appropriate licenses for the development of *water power* resources in the navigable waters of the United States" (*id.* at 172, n. 17; emphasis added). "The [Federal Water Power] Act was distinctly an effort to provide federal control over and give federal encouragement to *water power development*" (*id.* at 180, n. 28; emphasis added).

In *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153, the Court held that a comprehensive plan approved by Congress for the development of the water resources of the Roanoke River Basin was not intended to withdraw from the Commission its jurisdiction to license the construction and operation of a hydroelectric generating facility by a private power company at a site within the comprehensive plan. Reviewing "the role of the Commission in hydroelectric power development" (*id.* at 167), the Court stated that "the significant development has been the devising of a general power policy instead of *ad hoc* action by Congress (*ibid.*). The original Federal Power Commission, composed of three cabinet officers, was "[a]n agency so burdened with other duties [that it] was naturally found inadequate as the instrument of *these important water-power policies*" (*id.* at 168; emphasis added). The reconstituted Commission is "the permanent disinterested expert agency of Congress to carry out these policies" (*ibid.*).

We do not say that the decision in *Union Electric* forecloses further consideration of the issue presented here, since the narrow holding in that case was only that pumped-storage hydroelectric projects located on navigable federal waterways and generating electricity for interstate transmission must be licensed by the Commission. We do submit, however, that the reasoning of both the majority opinion and the dissenting opinion in *Union Electric* rests in part on the considered premise that Part I of the Federal Power Act confers on the Commission no licensing jurisdiction with respect to thermal-electric generating plants. That unanimously endorsed interpretation of the Act—with which Congress has apparently been content and which we have shown to be supported by the Act's language, history, and purpose and by 53 years of consistent administrative interpretation—warrants at least substantial weight in deciding the present case.

5. Technological changes since the Act was passed do not bring steam plants within the Commission's licensing jurisdiction.

The claimants argued in the court of appeals that technological advances have led to a "dramatic change in the [thermal-electric power] industry" (C.A. Br. 44), resulting in the construction of steam plants that have a much greater capacity and need for cooling waters than those in use in 1920. This change, they argued, "requires a corresponding modification in regulatory practices" consistent with the Commission's "flexible mandate from Congress * * * to institute comprehensive planning for the nation's waterways and to regulate the interstate electric power industry" (*id.* at 44–45).

The contention was correctly rejected by the court of appeals for the reasons given in its opinion. "[T]he FPC does not have a broad, abstract mandate either to regulate the electric power industry or to engage in comprehensive planning for the utilization of our major waterways. * * * The Federal Water Power Act of 1920 was intended to promote the comprehensive development of the Nation's water resources in the context of regulating hydroelectric power" (A. 88a–89a). Since "most of the electric power produced in this country at the time the Act was passed was generated by water-cooled steam plants * * * any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants" (A. 90a).

There is thus no reason to "conclude that recognizing Commission jurisdiction over steam plants is essential to fulfillment of the agency's congressional mandate" (*ibid.*). "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness" (*ibid.*). To adopt the claimants' position "would accomplish by judicial fiat what Congress has refused or neglected to accomplish when it enacted and later amended the Federal Water Power Act" (A. 97a).

The situation here is thus quite different from that in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, in which this Court held that the Federal Communications Commission has authority to regulate

CATV systems. The Court there reasoned that, while the provisions of the Communications Act do not expressly apply to CATV, "Congress could not in 1934 have foreseen the development" of such systems (*id.* at 172). Congress recognized, however, that the communications industry was a dynamic one, and it therefore deliberately "conferred upon the Commission a 'unified jurisdiction' and 'broad authority'" to execute "'a comprehensive mandate'" (*id.* at 172–173).

Moreover, the Court held that the Act's provisions—which apply to "all interstate and foreign communication by wire" (47 U.S.C. 152(a))—are broad enough to include CATV; that "[n]othing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions" (392 U.S. at 172); and that "[t]he Commission has reasonably found that the successful performance of [its] duties demands prompt and efficacious regulation of community antenna television systems" (*id.* at 177).

None of these conditions is present here. Congress *was* aware in 1920 and in 1935 that thermal-electric plants were the primary source of the Nation's electric energy. It did *not* give the Federal Power Commission a "comprehensive mandate" to regulate all aspects of the power industry. The Federal Power Act's language, history, and purposes *do* limit the Commission's authority to the licensing of hydroelectric projects. And the Commission has *not* deter-

mined that the successful performance of its regulatory duties with respect to hydroelectric projects requires the regulation of steam-electric plants.[29]

6. The contention that policy reasons support an extension of the Commission's jurisdiction to steam plants should be addressed to Congress, not the courts.

The claimants argued in the court of appeals that "there are important policy reasons favoring [the Commission's] jurisdiction" to license steam-electric power projects (C.A. Br. 12). They stated that "power plant siting problems have created a national energy crisis" (*ibid.*) and that "the Federal Power Commission is the logical agency to regulate power plant siting" (*id.* at 17), because the Commission "has had long experience in dealing with the problems of adequate power supply and the environmental effects of electric power production" (*id.* at 20).

We do not here undertake to dispute the claimants' "policy reasons," because we believe that they are beside the point. It may be, as the court of appeals stated, that, "[i]n this age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there

[29] Nor is this case like *American Trucking Associations* v. *United States*, 344 U.S. 298, in which the Interstate Commerce Commission promulgated rules to eliminate practices in the trucking industry that were not specifically prohibited by the statute but that endangered the enforcement of "practically the entire regulatory scheme" (*id.* at 312). The extension of the Commission's jurisdiction sought by the claimants in the present case would not eliminate new evils in the hydroelectric power industry but would bring under regulation a distinct industry to which the Act was not meant to apply.

should be no federal agency or policy governing the siting and operation of fossil-fueled steam plants" (A. 92a–93a). And perhaps the Federal Power Commission *is* "the logical agency to design and implement a national siting policy" (A. 95a). Indeed, the Commission has supported legislation to that effect (see A. 95a–96a).

But the issue in this case is not what the Nation's policy should be with respect to power plant siting. It is simply whether the existing provisions of the Federal Power Act give the Commission licensing jurisdiction with respect to steam-electric power facilities. As we have shown, the answer to that question is that Commission has no such authority. Moreover, "Congress * * * has not yet decided to provide explicitly for federal regulation of power plant siting" (A. 97a); even less has it determined what the policy will be or what agency will administer it.

If there are sound reasons of policy to amend the existing statute to give the Commission licensing authority over steam-electric facilities, those reasons should be addressed to Congress, not the courts. It is the legislative branch of government, not the judicial, that is equipped to assess the advantages and disadvantages of a proposed extension of the Commission's jurisdiction and to take full account of the practical consequences of such a change.

To extend the Commission's jurisdiction in the manner sought by the claimants would raise a variety of questions that would require a peculiarly legislative response. For example, the licensing of nuclear-powered thermal-electric generating plants is pres-

ently committed to the jurisdiction of the Atomic Energy Commission, which administers a comprehensive scheme of regulation. Should the Power Commission be given overlapping authority with respect to nuclear plants, or should it be limited to conventional fossil-fueled plants? Should the Commission's licensing authority comprehend all aspects of a steam plant's facilities, or should it relate only to the diversion facilities used to draw cooling waters from a waterway subject to federal jurisdiction? Should the licensing requirement be prospective only, or should it apply to existing facilities and those under construction?

Should the federal government preempt all regulatory authority over steam plants, or should the states retain a role in the regulatory scheme? Should the entire federal regulatory authority, including the authority to dispose of waters subject to federal jurisdiction, be concentrated in a single agency, or should it be divided among the existing agencies and departments that have special expertise in one or more areas? Should the licensing agency be charged with developing a comprehensive plan for the development and conservation of water resources? Should it develop a comprehensive scheme for regulating the entire electric power industry?

What licensing standards should the agency apply? What environmental considerations should it take into account? What role should it play in determinations of plant siting? Should steam plant licensees, like licensees of hydroelectric plants (16 U.S.C. 814), be given the power of eminent domain in certain cir-

cumstances? In this time of critical energy shortage, what measures should be included to minimize unnecessary delay in the licensing process?

These questions are not answered by the existing statute, because the Federal Water Power Act was not designed to apply to the steam-electric industry. A judicial expansion of the Commission's authority in these circumstances would leave the agency without an adequate statutory framework to support a new regulatory undertaking. Congress alone has the institutional capacity to gather the necessary information, to weigh all the complex policy considerations, to accommodate the important conflicting interests, and to fashion a statutory scheme that will adequately guide the agency charged with its administration. Several pending bills dealing with the siting of power plants may provide Congress with an opportunity to perform that function in this area.[50]

C. THE SURPLUS WATER CLAUSE IS NOT AN EXCEPTION TO THE ACT'S LIMITATIONS; IT REQUIRES A LICENSE ONLY FOR THE USE OF SURPLUS WATER FROM A GOVERNMENT DAM IN CONNECTION WITH THE DEVELOPMENT OF HYDROELECTRIC ENERGY

1. The history and purpose of the Act show that the surplus water clause, like the rest of the Act's provisions, applies only to the development of hydroelectric energy.

On the basis of its own compelling analysis of the Federal Power Act's history and purposes, the court of appeals correctly concluded that "the structures comprising thermal-electric plants are not 'project' works' required to be licensed by the FPC under § 4(e)" (A. 55a). That analysis did not focus on the

[50] See, *e.g.*, H.R. 180, H.R. 2374, H.R. 3591, H.R. 4874, H.R. 5278, H.R. 13204, H.R. 13484, and S. 935, 93d Cong.

"project works" clause alone or even on Section 4(e). The legislative, administrative, and judicial authority on which it was grounded relates to the proper interpretation of the Act as a whole.

When the court turned to a consideration of the "surplus water" clause of the same section, however, it inexplicably ignored the overwhelming case it had already made concerning the Act's limited scope and purpose. The court thus stated, in our view incorrectly, that "there apparently is no useful legislative history" bearing on the meaning of the "surplus water" clause (A. 101a), and it erroneously concluded, on the basis of "[w]hat little extrinsic assistance we have been able to piece together" (*ibid.*), that "the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants" (A. 112a).

There is, contrary to the court's assumption, a wealth of legislative history on the surplus water clause, and that history is fully consistent with the Act's limited purpose of developing *hydroelectric* power but not regulating steam power. We have already shown that the title, preamble, and text of the Act relate exclusively to water power, that its overall legislative history belies any intention on the part of Congress to regulate the use of water by steam-electric generating plants, that the Commission has always viewed its licensing juridiction as limited to hydroelectric facilities, and that this Court's deci-

sions clearly reflect the same understanding of the Commission's jurisdiction.[31]

In these circumstances, we submit, only a strong and unambiguous showing of legislative intent could support claimants' contention and the court of appeals' conclusion that the surplus water clause, as an isolated exception to the rest of the Act's provisions, authorizes the Commission to license the use of such water not only for the development of hydroelectric energy but also for cooling purposes in thermal-electric plants. Neither the court nor the claimants, however, have made any such showing. On the contrary, the legislative history indicates that the surplus water clause, like the rest of the Act, relates exclusively to the development of hydroelectric energy.

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[31] The scope of the Commission's licensing authority under Section 4(e) is illuminated, moreover, by the language of Section 23(b), 16 U.S.C. 817, which states the circumstances in which a person is *required* to obtain a license (see note 10, *supra*). Section 23(b) provides that "[i]t shall be unlawful for any person, State, or municipality, *for the purpose of developing electric power*, to * * * utilize the surplus water or water power from any Government dam" (emphasis added) except in accordance with a license issued by the Commission. Only a hydroelectric facility can fairly be said to use "surplus water or water power" "for the purpose of developing electric power." It is true that steam plants use cooling water to condense the steam which turns the turbines and that those waters may "increase the efficiency of the generating process" (A. 91a, n. 128). But only in hydroelectric generation is the water itself the power source. We submit, therefore, that the reference in Section 23(b) to using water "for the purpose of developing electric power" means harnessing the power of falling water to produce electric energy.

The phrase "surplus water" has its roots in federal legislation enacted between 1888 and 1909, which conferred on the Secretary of War authority to lease surplus water at specific federal dams for the development of water power at the dam site (Supp. 2s–10s).[32] Congress first began considering comprehensive water resource development in 1914. In that year, a bill was introduced in the House (H.R. 16053, 63d Cong., 2d Sess.) to amend the General Dam Act.

Section 14 of the bill, the antecedent of the present Section 4(e)'s surplus water clause, authorized the Secretary of War to lease "the right *to develop power from the surplus water* over and above that required for navigation at any navigation dam now or hereafter constructed * * * and owned by the United States" (emphasis added). The report of the House Committee on Interstate and Foreign Commerce described Section 14 as "a new section authorizing the Secretary of War to lease * * * any *surplus power developed by a dam* that is constructed or owned by the United States for the purposes of navigation" (H. Rep. No. 592, 63d Cong., 2d Sess., p. 6).

Remarks on the floor of the House confirm that Section 14 was concerned solely with the use of surplus water to generate hydroelectric energy. Congressman Mann stated that at many of the federal dams "there is surplus water which may be used for the

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[32] "Supp." refers to the supplement to the brief of Arizona Public Service Company, *et al.* The supplement contains an extensive legislative history of the surplus water clause, which shows that the clause relates only to the development of hydroelectric power.

development of water power" and that Section 14 authorizes "the Secretary of War to lease that surplus water power and make charges for it" (51 Cong. Rec. 11403). Similarly, Congressman Brown, in extended remarks, stated that Section 14 "permits the Secretary of War and the Chief of Engineers to lease the right to develop power from the surplus water flowing over any dam" (51 Cong. Rec. App. 768). Steam power was alluded to only as a competing source of electric energy that would influence the cost of hydroelectric energy but that would not itself be suitable for regulation (see 51 Cong. Rec. 12336 (Congressman Underwood), 12593 (Congressman Bryan), 12769 (Congressman Lenroot), 12777 (Congressman Rainey)).

Section 14 was amended on the floor of the House to give a preference to municipalities over private corporations in the procurement of leases and to limit the term of a lease to 50 years (see *id.* at 13256–13260). The amendment also changed the surplus water language of the Section in a way that resembles the present language of Section 4(e). The amended Section 14 authorized "leases for the use of *surplus water and water power* generated at dams and works constructed wholly or in part by the United States in the interest of navigation" (*id.* at 13256; emphasis added).

The change from "surplus water" to "surplus water and water power" was not explained. Since prior bills and committee reports had freely interchanged the terms "surplus water," "surplus power," and "surplus water power," the phrase "surplus water and water power" may have been chosen to avoid any sug-

gestion that one or another of those concepts was intentionally excluded and to reflect the fact that water in excess of that needed for government purposes may be viewed in terms either of volume (gallons or acre-feet) or in terms of power potential (energy generating capacity).[35]

It is clear, in any event, that the change was not intended to reach the use of water for purposes other than hydroelectric generation. As Congressman Stevens, author of the amendment, explained, "the only substantial change * * * is that no lease of water-power rights to anyone shall be for a longer period than 50 years"; "no lease of water-power rights * * * should be given in perpetuity to any corporation, private or public" (*id.* at 13257). If the phrase "surplus water and water power" had been designed to bring the steam power industry within the Commission's licensing jurisdiction, that surely would have been a "substantial change" worthy of mention by the author of the amendment.

The bill as amended was passed by the House (*id.* at 13276) and sent to the Senate. The Senate Commerce Committee reported out a substitute bill (S.

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[35] In *California Oregon Power Co.*, 15 FPC 14, petition for review dismissed *sub nom. California Oregon Power Co.* v. *Federal Power Commission*, 239 F. 2d 426 (C.A. D.C.), the Commission drew another distinction. It held that a hydroelectric plant located downstream from a government dam uses "surplus water" from the dam within the meaning of Section 4(e) if its operation depends upon water released from the dam. It stated that "water power" from the dam, by contrast, "is the result of the head and flow there available," and its use "is limited by natural laws to those developments at or in the vicinity" of the dam (15 FPC at 20).

6413, 63d Cong., 2d Sess.) containing another version of a surplus water clause.[34] Like the House bill, however, the Senate bill was directed only to "[t]he question of water-power development by the construction of dams across navigable streams and the improvement of navigation in connection with water-power development" (S. Rep. No. 846, 63d Cong., 3d Sess., p. 1). No action was taken on the Senate bill in the 63d Congress.

Similar bills were introduced in the 64th and 65th Congresses, and the legislative history of those bills shows that Congress continued to view the surplus water clause as limited to the development of water power (see Supp. 29s–51s). The phrase "surplus water and water power" reappeared in the 64th Congress as a House substitute for Section 19 of S. 3331. The House Committee on Interstate and Foreign Commerce reported that "Section 19 regulates the method to be pursued by the War Department in *leasing the power* at [federal] dams" and that it "continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures" (H. Rep. No. 404, 64th Cong., 1st Sess., p. 11; emphasis added). There was nothing in the report or the floor debates to suggest that the licensing authority would extend to the use of water by steam plants (see Supp. 33s–35s).

The 65th Congress considered the bill proposed by

[34] Section 10 of the bill authorized the Secretary of War to lease "the right to utilize the surplus water over and above that required for navigation at any [federal] navigation dam * * *."

President Wilson (H.R. 8716, 65th Cong., 2d Sess.), which, as amended by the 65th and 66th Congresses, ultimately became the Federal Water Power Act. The proposed bill was submitted to the House as a substitute for S. 1419 (see p. 22, *supra*) and was referred to the special House Committee on Water Power, which held extensive hearings. As introduced in the committee, Section 4(d) of the bill, in language that closely parallels the present language of Section 4(e) of the Federal Power Act, authorized the Commission (which was to be composed of the Secretaries of War, Interior, and Agriculture) to issue licenses for the purpose of constructing and operating dams and other "project works" and "for the purpose of utilizing the *surplus water or water power* over and above that required for navigation at any navigation dam now or hereafter constructed * * * and owned by the United States" (H. Rep. No. 715, 65th Cong., 2d Sess., p. 23; emphasis added). There is no indication that the substitution of "or" for "and" in the phrase "surplus water or water power" was intended to change the substance of the clause as contained in prior bills.

As reported out of the committee, the clause in Section 4(d) read "for the purpose of utilizing the surplus water or water power from any navigation dam" (*id.* at 3).[35] The changes and deletions were not

[35] The phrase "navigation dam" was defined in Section 3 as "a dam or other work, constructed or owned by the United States for the improvement of navigation * * * from which flows surplus water not needed for navigation that may be disposed of under the provisions of this Act" (H. Rep. No. 715, 65th Cong., 2d Sess., p. 2).

meant to expand the Commission's licensing jurisdiction over the use of water beyond its use for hydroelectric generation (Supp. 39s–44s). During the hearings, Department of Agriculture engineer O. C. Merrill, the principal draftsman of the bill, testified that the bill was not designed to regulate the use of water for purposes of irrigation. "The only thing this bill is doing is to grant a license for that particular power development occupying the public lands. There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development" (Hearings before the House Committee on Water Power, 65th Cong., 2d Sess., pp. 89–90). Similarly, Congressman Taylor stated that "this bill is for the purpose, as I understand it, of giving authority to create power and *utilize water for power purposes*" (*id.* at 92; emphasis added).

Although the Senate never acted on the conference report on S. 1419,[36] the bill, as amended, was introduced again in the 66th Congress, was passed by both houses, and was signed into law on June 10, 1920.[37] The congressional debate shows that the legis-

[36] The conferees substituted the phrase "Government dam" for "navigation dam" in Section 4(d) as "a more comprehensive and clearer expression of what is intended" (H. Conf. Rep. No. 1147, 65th Cong., 3d Sess., p. 15). The definition of "Government dam" in Section 3 was accordingly expanded to include dams constructed or owned by the United States "for Government purposes * * * from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this Act" (*id.* at 2).

[37] In the 66th Congress, the words "from which flows surplus water not needed for Government purposes that may be dis-

lators viewed the bill as regulating only the development of water power, and there is nothing to suggest that the surplus water provision was intended to be an exception (see Supp. 51s–87s). The surplus water clause as enacted thus embodied the same meaning that it had in its earlier form in the 63d Congress, when Section 14 of H.R. 16053 had authorized the Secretary of War to license "the right to develop power from the surplus water over and above that required for navigation at any navigation dam * * *." Although the clause as enacted applies to any government dam and not merely navigation dams, its purpose continues to be to regulate the development of power from surplus water not needed for government purposes.

2. The Act does not assign to the Federal Power Commission the broad responsibilities that prior legislation had given to the Waterways Commission, and those responsibilities did not, in any event include licensing the use of surplus water by steam plants.

In concluding that the Federal Water Power Act was intended to authorize the Commission to license the use of surplus water by thermal-electric generating plants, the court of appeals relied upon the Act's repealing of a 1917 river and harbors appropriation Act, which had created a Waterways Commission with broad responsibilities to coordinate water use planning (A. 107a). The court reasoned that "the newly created Federal Power Commission took over

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posed of under this Act" were deleted from the definition of "Government dam" as "not necessary to the definition" (H. Rep. No. 910, 66th Cong., 2d Sess., p. 7). The deletion did not change the meaning.

the planning and coordination responsibilities of the Waterways Commission, which included consideration of a spectrum of water uses not related to water power" (*ibid.*; footnote omitted). It therefore concluded that the Federal Water Power Act "reflects * * * a concern with comprehensive water resource management" (A. 109a) and that the surplus water clause gives the Commission authority to license "a spectrum of water uses not related to water power" (A. 107a), including the use of water for cooling purposes by steam plants.

The court's premises are incorrect. The Waterways Commission's responsibilities were investigatory, not regulatory, and even those responsibilities were not inherited by the Power Commission. The Waterways Commission was created by Section 18 of the Rivers and Harbors Act of 1917, 40 Stat. 269. It was given authority to coordinate the efforts of all government departments and agencies "in investigating, with respect to all watersheds in the United States," a wide variety of questions concerning water resource development and conservation.[35] The Commission was directed "to secure the necessary data, and to formulate and report to Congress * * * a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose * * *."

[35] The Act specified as topics for investigation "navigation * * *, irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses * * *."

The Act gave the Waterways Commission no licensing jurisdiction and no regulatory authority.

Section 29 of the Federal Water Power Act, which repealed "all Acts or parts of Acts inconsistent with this Act," also expressly repealed Section 18 of the 1917 Act creating the Waterways Commission. The court of appeals thought that the "newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Commission" (A. 107a). But the history of Section 29 shows that Congress did not intend to transfer the Waterways Commission's functions to the new Power Commission.

Repeal of the statute creating the Waterways Commission was first proposed and approved on the House floor during consideration of Section 29. The purpose was to avoid the possibility of conflict between the two commissions in areas of common responsibility and to eliminate a commission whose functions had never been exercised because President Wilson had never appointed its members (58 Cong. Rec. 2250–2251).

In the Senate, the Commerce Committee agreed that the Waterways Commission should be eliminated (S. Rep. No. 180, 66th Cong., 1st Sess., p. 20), but an amendment was adopted on the Senate floor to continue the existence of the Waterways Commission with certain changes not important here (59 Cong. Rec. 1535). Supporters of the amendment thought the Waterways Commission should be continued because its authority "is very much more comprehensive and covers infinitely more ground than the Water Power Commission created in the pending act" (remarks of

Senator Ransdell, *id.* at 1176; see, also, remarks of Senator Ashurst, *id.* at 1174–1175).

The Senate amendment was omitted in conference, and the final bill therefore repealed the authority of the Waterways Commission (H. Rep. No. 910, 66th Cong., 2d Sess., pp. 13–14). One of the House conferees explained why the Senate amendment had been omitted (59 Cong. Rec. 6525):

> The President never appointed the [Waterways] commission, notwithstanding the act was passed as far back as 1917. Moreover, many of the powers that were given to the commission we have given to various bodies created in the transportation act of 1920, especially with reference to inland water transportation. Other powers granted in the [1917] Act are contained in this water-power bill. So there was very little left for this commission to do.

There is thus no foundation for the court of appeals' conclusion that the functions of the Waterways Commission with respect to uses of water for other than the development of hydroelectric energy were inherited by the new Power Commission. The contrary is true. What the Act did not expressly give to the Power Commission, and what had not previously been transferred to other agencies, was eliminated.

3. That Congress has explicitly conferred on other officers and agencies the authority to permit the use of water within their jurisdiction for purposes other than hydroelectric generation does not mean that Congress intended to give the Power Commission similar authority.

The court of appeals thought that its interpretation of the surplus water clause was strengthened by legislation enacted prior and subsequent to the Federal

Water Power Act that authorized other agencies and departments to enter into contracts permitting the use of water within their jurisdiction for purposes other than the development of hydroelectric power (A. 169a–112a). For example, the Reclamation Act of 1920, 43 U.S.C. 521, enacted about three months prior to the Federal Water Power Act, authorized the Secretary of the Interior, "in connection with the operations under the reclamation law * * * to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper * * *."

Similarly, the Secretary of the Interior is authorized under the Boulder Canyon Project Act "to contract for the storage of water in [the Hoover Dam] reservoir and for the delivery thereof * * * for irrigation and domestic uses" (43 U.S.C. 617d). The Secretary of the Army likewise "is authorized to make contracts * * * for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army" (33 U.S.C. 708).

From this and similar legislation, the court of appeals inferred that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency" (A. 111a–112a). We do not disagree with that inference. We do dispute, however, the correctness of the court's further conclusion that "the 'surplus water' provision of the Federal Power Act [is] but an early manifestation

of that concern" and that "Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced" (A. 112a).

If the legislation giving other officers explicit authority to dispose of surplus water for purposes other than hydroelectric power development has any bearing at all on the proper interpretation of Section 4(e) of the Federal Power Act, it demonstrates only that when Congress has intended to confer that broad contractual authority it has known how to do so unambiguously. In light of the history of the surplus water clause in Section 4(e), there is no foundation for the court's assumption that Congress meant to give the Commission *licensing* authority, equivalent to the Secretary of the Interior's *contractual* authority, over non-hydro-power uses of surplus water. The scheme and purpose of the Act, the contemporaneous administrative construction, and this Court's decisions all support the Commission's determination that its jurisdiction extends only to use of surplus water for the generation of hydroelectric energy.

4. The Commission's jurisdiction to license the use of surplus water is not duplicative of its jurisdiction to license the construction, operation, and maintenance of project works.

Complainants argued in the court of appeals that, if the surplus water clause were applicable only to the use of such water for hydroelectric generation, "that clause would be rendered nugatory and meaningless," because "[a]ll hydroelectric developments on naviga-

ble streams and other streams over which Congress has authority under its interstate and foreign commerce power are already subject to regulation under the 'constructing, operating, and maintaining' clause of Section 4(e), whether or not they use surplus water from government dams" (C.A. Reply Br. 14–15).

Even if complainants' view of the Commission's jurisdiction under the project works clause were correct, it would not follow that the surplus water clause "would be rendered nugatory" by the Commission's interpretation of it. A license to construct, operate, and maintain project works does not necessarily carry with it the authority to use surplus water from a government dam. Where a project will use such water, it may require a license under both clauses. See *California Oregon Power Co.*, 13 FPC 1, 3, and 15 FPC 14, 18–21 (supplemental opinion), petition for review dismissed, 239 F. 2d 426 (C.A.D.C.); *Alabama Power Co.*, 34 FPC 1108.[39]

Moreover, complainants' extravagant view of the Commission's jurisdiction is incorrect. If it were true, as complainants assert, that "[a]ll hydroelectric developments on navigable streams and other streams over which Congress has jurisdiction under its interstate and foreign commerce power are already subject to regulation under the 'construcing, operating, and maintaining' clause of Section 4(e), whether or not

[39] Congress could also give an agency alternative, albeit coextensive, bases of jurisdiction, so that the agency could proceed on the strength of one where the existence of the other is unclear. Neither jurisdictional base would be "meaningless," even though each comprehends no more than the other.

they use surplus water from government dams" (C. A. Reply Br. 14–15), then there would have been no need for this Court to decide *Federal Power Commission* v. *Union Electric Co., supra.*

The pumped-storage project in that case was a hydroelectric facility located on a stream over which Congress has jurisdiction under its interstate and foreign commerce power. On complainants' theory, that alone would have been enough to bring the project within the Commission's licensing jurisdiction. But, as this Court's opinion makes clear, a license would *not* have been required for the project if the electricity was to have been transmitted solely in intrastate commerce.

What the complainants overlook is that the provisions of Section 4(e) conferring licensing authority on the Commission must be read together with the provisions of Section 23(b) specifying the situations in which a license is required.[40] While Section 4(e) might appear to authorize the issuance of a license to any hydroelectric plant on a waterway within federal jurisdiction—*i.e.*, "for the development * * * of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States"—Section 23 (b) specifies the circumstances in which a license for such a project is required. Thus Section 23(b) requires a license for hydroelectric developments on navigable

[40] Section 23(b) is set forth in the Appendix to this brief, *infra*, pp. 63–64.

streams. If a project is on a *non*-navigable stream, a license is required only if the stream is within the jurisdiction of Congress and the project's construction would affect the interests of interstate or foreign commerce (the situation in *Union Electric*). A license is also required if the project is on public land or reservations, or if the project would "utilize the surplus water or water power from any Government dam * * *."

Thus, when Section 4(e) is read in connection with Section 23(b), it becomes apparent that the surplus water clause does have independent application and could alone provide the basis for a license. A hydroelectric facility located on a non-navigable waterway, on private land, generating electricity solely for intrastate transmission, and in no other way affecting the interests of interstate or foreign commerce, would require a license if, but only if, it were using surplus water from a federal dam.

Although the Commission has not frequently found it necessary to rest its licensing jurisdiction solely on the surplus water clause, it has done so on occasion. *Green Mountain Power Corp.*, 13 FPC 1211; *Utah Power & Light Co.*, 31 FPC 958, vacated, 31 FPC 1537. What matters, in any event, is not whether a pure surplus water case has actually arisen, but that, as we have shown, such cases can arise under the Commission's interpretation of the Act. Contrary to the claimants' contention, therefore, the Commission's interpretation does not render the surplus water clause superfluous.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it upholds the Federal Power Commission's determination that it lacks licensing jurisdiction under the project works clause of Section 4 (e), and reversed insofar as it sets aside the Commission's order on the basis of the surplus water clause; and the case should be remanded to that court with directions to enter a judgment of affirmance.

Respectfully submitted.

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APPENDIX

1. Section 3 of the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 796, provides in part:

> The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> * * * * *
>
> (10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;
>
> (11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;
>
> (12) "project works" means the physical structures of a project * * *.

2. Section 4 of the Federal Power Act, 41 Stat. 1065, as amended, 16 U.S.C. 797, provides in part:

> The Commission is authorized and empowered—
>
> * * * * *

(e) * * * To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Govenment dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the

commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

3. Section 23(b) of the Federal Power Act, 41 Stat. 1075, as amended, 16 U.S.C. 817, provides:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such con-

struction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-[illegible]

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CHEMEHUEVI TRIBE OF INDIANS, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE

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BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE

In accordance with this Court's Rule 42, Edison Electric Institute has received the consent of counsel for all other parties to file this brief *amicus curiae.*

INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 193 operating companies which supply electricity to 77 percent of all the electric service customers in the United States. This brief is sub-

mitted in support of the Petition for a Writ of Certiorari being filed by the Solicitor General for the Federal Power Commission. EEI also supports a similar petition being filed by Arizona Public Service Co., *et al.*, intervenors in the court below.

The decision below[1] would impose Federal Power Commission ("FPC") licensing jurisdiction on the use of cooling water by thermal-electric generating plants, if the water is found by the FPC to be "surplus water" drawn from either of two sources: a reservoir behind a dam operated by an agency of the Federal Government, or any portion of a river located downstream from a Government dam.[2] A substantial number of the estimated 876 thermal power plants planned for construction and operation between 1970-1990 will draw cooling water from these two sources.[3]

Approximately 700 major dams are currently operated by federal agencies.[4] The decision below has set

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[1] Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207 (D.C. Cir. 1974). The decision is reprinted with Federal Reporter pagination in the Appendix to the Petition for Certiorari filed by Arizona Public Service Co., *et al.*

[2] A modern 1000 megawatt fossil-fueled plant with a "once-through" cooling system requires a water flow through the condenser of about 1500 cubic feet per second. FPC, 1970 National Power Survey, pt. I, at I-1-25 (1971).

[3] *Id.* at I-1-17, Table 1.2. During the period 1970-1990, it will be necessary to almost quadruple the industry's present generating capacity to meet projected demand.

[4] Included in this category are TVA-operated hydroelectric facilities, flood control and multiple-purpose dams operated by the U.S. Army Corps of Engineers, and storage dams operated by the Department of the Interior Bureau of Reclamation. Approximately 500 additional dams are operated by the Corps of Engineers and the Bureau of Reclamation for navigational and water diversion purposes.

the stage for a series of jurisdictional confrontations between those agencies and the FPC. A formal license application to the FPC would be required to determine two issues: whether "surplus water" would be utilized for a proposed power plant and, if so, whether it should be used for cooling purposes or committed to competing uses. Resolution of those issues will inevitably require substantial delays in the approval of construction sites for new electric generating plants. Individual utilities will be faced with one more uncertainty in the planning process, not accompanied by offsetting regulatory benefits.

Edison Electric Institute believes that the decision below would impose a totally unnecessary federal regulatory scheme upon the present federal-state regulation of power plant siting and operations. More important, the resulting interagency conflict would impair the ability of the electric utility industry to continue to provide the nation with an adequate supply of electric energy.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Edison Electric Institute believes that a writ of certiorari should be granted because the lower court's construction of the "surplus water" clause and the resulting extension of FPC jurisdiction cannot be reconciled either with this Court's analysis of the Commission's jurisdiction in *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), or with the lower court's own analysis of the legislative history and purposes of the Federal Water Power Act.

Since the first year of its existence, the Federal Power Commission has consistently held that it lacks jurisdiction to license steam-electric generating plants.

The decision by the Court of Appeals reverses that 53-year-old rule with respect to plants using "surplus water." It ignores a pattern of legislation going back to 1906 expressly granting jurisdiction over the disposition of "surplus water" to other Government departments and agencies.

I.

THE DECISION BELOW FAILS TO REFLECT THE LIMITATION OF FPC JURISDICTION DETERMINED BY THIS COURT IN TAUM SAUK.

In construing the "surplus water" clause of Section 4(e) of the Federal Power Act,[5] the court below has extended FPC jurisdiction far beyond the concerns that prompted Congress to enact the original Federal Water Power Act in 1920. The decision of the Court of Appeals is inconsistent with this Court's finding in the *Taum Sauk* case, *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), that an "obvious distinction" removes steam-electric generating plants from the regulatory scheme contemplated by Congress in 1920.

In *Taum Sauk*, it was held that Section 23(b) of the Federal Power Act[6] requires an FPC license for construction of a pumped-storage hydroelectric project utilizing the waters of a non-navigable river subject to federal jurisdiction to generate electricity for interstate transmission. The argument was made there that if FPC licensing jurisdiction is based on the interstate transmission of energy, there can be no basis for distinguishing between a steam-electric plant and a hydroelectric facility, if each generates electricity for interstate transmission and uses water subject to fed-

[5] 16 U.S.C. § 797(e) (1970).

[6] 16 U.S.C. § 817 (1970).

eral jurisdiction. This Court rejected that argument, finding that the two types of generating plant are distinguishable on the basis of the "central concern" of the Act:

> ". . . Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." 381 U.S. at 110.

This distinction provides the barrier preventing a jurisdictional leap to all steam-electric plants generating electricity for interstate transmission and using cooling water over which Congress has jurisdiction. It does not result from any intricate construction of the language of Section 23(b). Rather, it is found in the "central concern" of the original Federal Water Power Act.

In construing the "surplus water" clause of Section 4(e), the court below expressly found that no such distinction exists. After observing that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power," 489 F.2d at 1242, the court concluded:

> "At a minimum Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." *Id.*

Support for that conclusion was not derived from the legislative history of the Federal Water Power Act. Indeed, the court found that "there is little in the way

of extrinsic illumination of the congressional purpose in enacting the 'surplus water' clause . . . and there apparently is no useful legislative history." 489 F.2d at 1236-7.

The decision refers instead to pre-1920 Supreme Court cases and acts of Congress relating to the federal leasing and sale of surplus water power. The lower court's historical analysis includes only one explicit reference to congressional interest in control of water uses unrelated to water power. In 1917 Congress created a Waterways Commission which was empowered to coordinate and plan virtually all aspects of water resources development.[7] Noting that the Federal Water Power Act explicitly repealed the act creating the Waterways Commission, the Court of Appeals assumed that all of the broad duties granted to the Waterways Commission were simply relocated in the FPC. That assumption is inconsistent with the purposes of the Federal Water Power Act described by this Court in *Taum Sauk,* and it is also contradicted by the lower court's own exhaustive account of the Federal Water Power Act's legislative history contained in the portion of the decision construing the "project works" clause of Section 4(e). The Act of 1917 provides no valid historical basis for assuming that Congress, in enacting the Federal Water Power Act, was concerned with the use of surplus water unrelated to its use for hydroelectric power.

The Court of Appeals relied extensively on the legislative history of the Federal Water Power Act in finding that the FPC lacks jurisdiction under the "project works" clause. However, the lower court abruptly

[7] Act of August 8, 1917, ch. 49, 40 Stat. 250.

abandoned its analysis of the legislative history when it turned to the "surplus water" clause in the same section of the Act. The result was a literal construction of the clause which is plainly erroneous when juxtaposed with the court's own earlier descriptions of the legislative history:

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power.
>
> * * *
>
> "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness." 489 F.2d at 1222-3, 1231.[8]

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[8] The court's conclusions are well supported by excerpts from the legislative history cited in the decision.

> "The industrial expansion . . . has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 percent since 1914. This increase . . . has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. . . .
>
> "*While the form of bill which has been presented for your consideration is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry."

Letter dated Feb. 27, 1918 from Secretaries of War, Interior, and Agriculture transmitting H. R. 8716, 65th Cong., 2d Sess. (1918). (Emphasis added.)

> "The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants at the mine itself and operate all in great interstate systems."

Report from Secretary Houston to the House, H. R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

Having made these observations, the court below proceeded to ignore them in construing the "surplus water" clause, insisting that no useful legislative history exists to explain the congressional purpose in enacting that clause. The apparent requirement for excerpts from the legislative history pertaining directly to the "surplus water" provision defies explanation. Such a requirement was not imposed by either the majority or the dissenting Justices in *Taum Sauk* when they construed the "interests of commerce" provision of Section 23(b).

The Court of Appeals, in applying relevant legislative history to only one of the two clauses construed in the decision below, has injected into its decision a massive inconsistency involving important questions of FPC jurisdiction. The result is also inconsistent with the statutory interpretation adopted by this Court in *Taum Sauk*.

II.

THE DECISION BELOW MISREADS THE EFFECT OF FEDERAL LEGISLATION AUTHORIZING OTHER AGENCIES TO DISPOSE OF "SURPLUS WATER".

In its analysis of the background of the Federal Water Power Act, the court below noted earlier legislation, particularly the 1906 amendments to the Reclamation Act,[9] empowering the Secretary of Interior or the Secretary of War to dispose of surplus water from a Government dam. 489 F.2d at 1238-9. The Court of Appeals also noted a series of post-1920 statutes containing similar grants of authority. 489 F.2d at 1241. From that pattern of legislation, the lower court erected the

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[9] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

premise that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency." 489 F.2d at 1242. From that premise, the Court of Appeals proceeded to the conclusion that Congress intended the FPC to exercise that control.

The contrary conclusion more readily squares with the statutory pattern. Congress has repeatedly designated other agencies to lease or sell surplus water. For what purpose would it confer upon the FPC a redundant power to authorize the same uses? More sensible is the construction that Congress intended a division of authority, with the appropriate Secretary empowered to dispose of the surplus water, and the FPC chartered to license the construction of any "project works" to make use of that water. In that reading, of course, the "project works" required to be licensed would be limited under *Taum Sauk* to hydroelectric projects. If no hydroelectric "project works" were required to use the surplus water, there would be no need to seek an FPC license.

A second incongruity is raised by the lower court's conclusion that "Congress surely intended to give the FPC control over the use of surplus water for the generation of power, no matter by what mechanical force the electricity is ultimately produced." 489 F.2d at 1242. If so, why did Congress repeatedly after 1920 pass legislation conferring that power upon other agencies? We think those subsequent laws make plain that Congress had no idea in 1920 that it was giving plenary authority to the Federal Power Commission to license the use of "surplus water." The absence of any such

intent is borne out by the lack of separate legislative history for the "surplus water" clause.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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